FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1237

STATE OF NEW YORK,

Petitioner,

v.

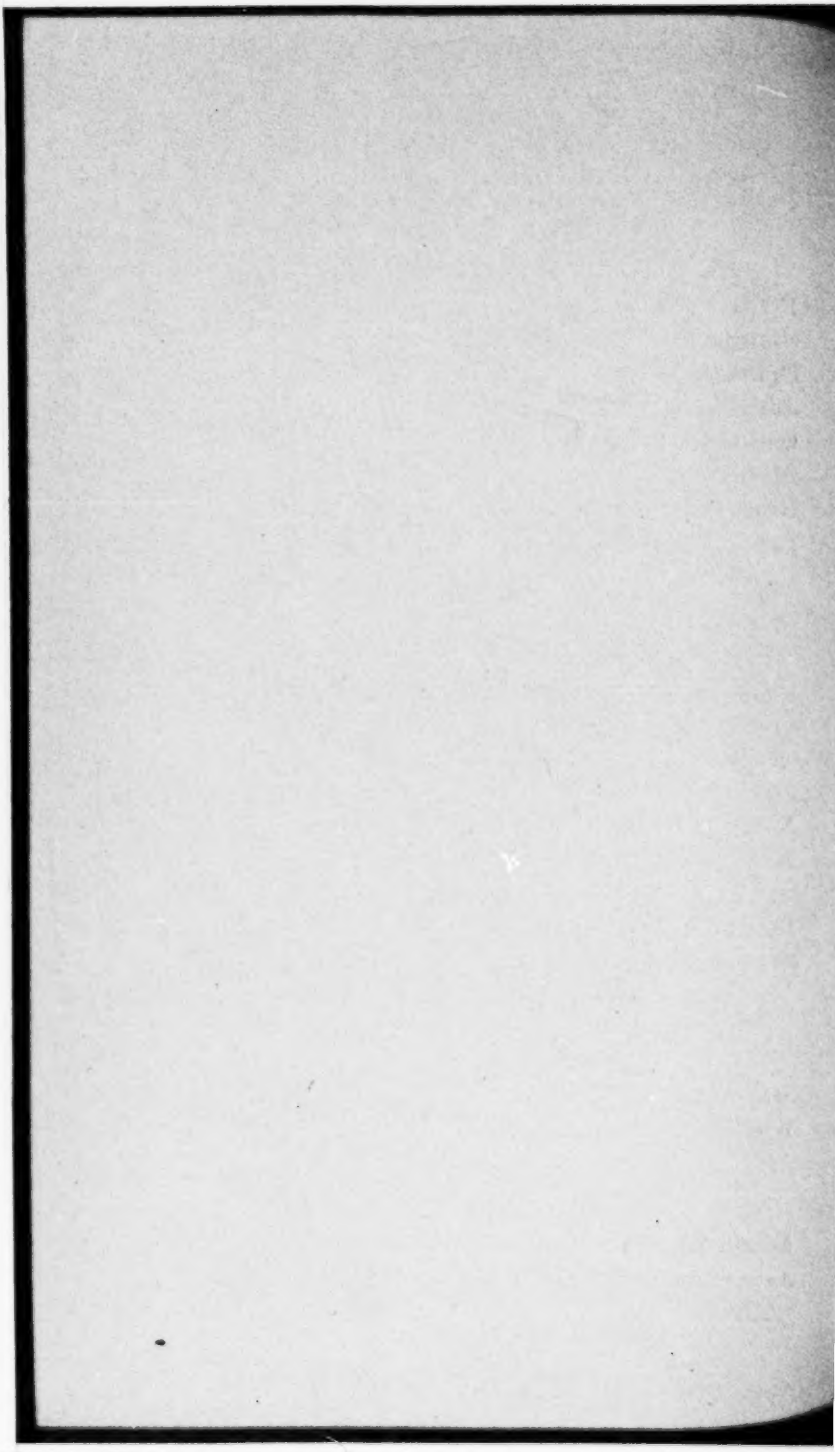
UNITED STATES OF AMERICA (relative to the condemnation by the United States of certain easement rights in 220 acres of land in Essex and Hamilton Counties, New York).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

See back



INDEX.

Table of Statutes, Etc.

Table of Cases.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

STATE OF NEW YORK,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner above named represented by Nathaniel L. Goldstein, Attorney General of the State of New York, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 121, October Term, 1946, United States of America, petitioner-appellee, v. State of New York, defendant-appellant, and that the judgment of the Circuit Court of Appeals and the judgment of the District Court may be reversed, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Matter Involved

This suit was brought by the United States in its District Court for the Northern District of New York in November, 1942 to condemn certain easement rights in 228.15 acres of land in Essex and Hamilton Counties. As to 220 acres owned by the State as a part of the Adirondack State Park or forest preserve the prayer of the petition was that the United States acquire an easement to construct, operate and maintain a railroad about thirty miles in length between North Creek and Sanford Lake, New York, "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order".

For reasons to be presented hereinafter, the State opposed the taking for the fifteen year period. It did not and does not oppose the immediate taking or its continuance for the duration of the war emergency.

The petition (R. 33-37) was met by an answer (R. 45-66), and the United States moved for summary judgment (R. 22-29), but no answering affidavit was served, the motion papers having been served on a representative of the State at the beginning of a trial or hearing at which certain testimony was offered on behalf of the State and the United States (R. 67-86, 101-140).

That was on March 18, 1943. About three years later and before final judgment, there having meanwhile been a decision and order by the District Judge granting summary judgment and dismissing the answer and an abortive effort to appeal from the order, a motion was made by the State to reopen the action and offer newly discovered evidence (R. 140-157), which motion was denied (R. 157-162).

The State's compensation for the condemnation was stipulated so that a final judgment could be entered, without prejudice to the State's contentions that the taking was excessive in duration (R. 162-165), final judgment was entered (R. 6-9), and the State appealed to the Circuit Court of Appeals (R. 3-5). The Circuit Court of Appeals affirmed, the majority opinion being by Judge Clark, Judge Swan concurring, and a dissenting opinion being written by Judge Learned Hand.

Opinions Below

The opinions of the District Court (R. 86-91, 157-160) are unreported. The opinions of the Circuit Court of Appeals, dated February 19, 1947, are thus far unreported, but probably will appear in 159 F. 2d.

Jurisdiction

The judgment (formerly called "order for mandate") of the Circuit Court of Appeals was entered on February 19, 1947. The jurisdiction of the Supreme Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. § 347).

Questions Presented

1. Whether, under an Act authorizing the Secretary of War to condemn,

> "any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes" (Second War Powers Act of 1942, 56 Stat. 177, 50 U. S. C. § 171-a),

and directing that the proceedings be in accordance with the General Condemnation Act of 1888 (25 Stat. 357, 40 U.

S. C. § 257), the provisions of the last mentioned Act are to be read as conferring additional authority for condemnation, to whatever extent is "necessary and advantageous" for "public uses".

2. Whether a declaration by the Secretary of War on October 30, 1942 (R. 136-137), that it is,

> "necessary and advantageous to the interests of the United States",

that certain interests in lands be acquired for construction of a railroad connection between North Creek and Sanford Lake, New York, which railroad is required,

> "for the transportation of strategic materials vital to the successful prosecution of the war",

and requesting condemnation, under the Second War Powers Act of 1942 aforesaid,

> "for military or other public purposes",

of an easement to construct, operate and maintain a railroad about thirty miles in length over 220 acres of the Adirondack Forest Preserve,

> "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order",

is such a declaration of public use and necessity that the courts cannot examine, relative to the fifteen year period, whether it is necessary for "military or other war purposes", or is in excess of a reasonable liquidation period.

3. Whether, hostilities having ceased, and the period for which the condemnation power under the Second War Powers Act of 1942 was to be in force, and very nearly the life period appointed for the Defense Plant Corporation in which the railroad was vested, it may have been an "arbitrary" act to continue possession and operation of the railroad for the purpose of realizing the most salvage.

Statutes Involved

The Second War Powers Act, of March 27, 1942 (56 Stat. 177, 50 U. S. C. §171-a, War Appendix § 632), referred to by the United States as "the main authority for the institution of this action" (R. 25 at fol. 73; compare, Judge Clark, C.C.A.*), is believed to be the *only* authority for the condemnation. So far as relevant, it provides as follows:

> "The Secretary of War * * * may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1(b) of the Act of July 2, 1940 (54 Stat. 712)."

The final provision of the 1942 Act (56 Stat. 187, 50 U. S. C. § 645) was that it remain in force only until December 31, 1944, or such earlier time as should be designated by Congress or the President. It has been variously extended (58 Stat. 827, 59 Stat. 658, 60 Stat. 345, Mar. 31, 1947).

In passing, it should be noted that although the petition and other documents refer to the War Purposes Act as last amended in 1918 (40 Stat. 518, 50 U. S. C. § 171, mentioned at R. 136, 139, 33, 29, etc.) with the implication that it gives some authority for present purposes, it applies only to condemnations of property,

> "for construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war",

and to other matters even more obviously irrelevant to the

---

* Subsequent references to Judge Clark's opinion will be merely "C. C. A." Paging of that opinion in the Record is not available at present.

present case, which is concerned with a railroad for transporting iron ore from mine to railhead.

The General Condemnation Act of August 1, 1888 (25 Stat. 357, 40 U. S. C. § 257), mentioned in the Second War Powers Act of 1942 with the phrase, "such proceedings to be in accordance with", provides as follows:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

Subsequent language confers jurisdiction upon the District Courts, etc. It should be noted that the "necessary or advantageous" phrase is not descriptive of the procuring of the real estate, which must find its own authority elsewhere than in this Act, but defines the occasion for using the particular procedure created in 1888.

The provision of the National Defense Act of July 2, 1940, to which the Second War Powers Act of 1942 referred relative to disposition of property condemned, as previously quoted, authorizes the Secretary of War to dispose of such property by methods broadly defined, "when he deems it necessary in the interest of the national defense" (54 Stat. 712, 50 U. S. C. § 1171, subd. b). This power expires not more than six months after the war (56 Stat. 317, 50 U. S. C. §§ 773, 776).

The State's answer adduced the facts, unnoticed by the petition, that the land in question is part of the Adirondack Forest Preserve, placed under special restrictions so far as the State is concerned by its Constitution, and was acquired by the Secretary of War for the Defense Plant Corporation, which is limited in active duration to 1947 (form-

erly January 22, now June 30) and which leased the railroad to National Lead Company until thirty days after termination of the unlimited emergency (R. 48-50, 59). Accordingly, the following provisions are relevant:

New York State Constitution, Art. XIV, § 1.

> "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."*

The portion of the Reconstruction Finance Corporation Act under which the Defense Plant Corporation was created (55 Stat. 249-250, 15 U. S. C. § 606-b, subd. 3) provides:

> "No corporation heretofore or hereafter created or organized by the [Reconstruction Finance] Corporation pursuant to this subsection shall have succession beyond June 30, 1947 [formerly January 22, 1947], except for purposes of liquidation, unless the life of such corporation is extended beyond such date pursuant to an Act of Congress."

Reasons Relied on for Allowance of the Writ

A.

It is submitted that the Secretary of War misapprehended the measure of his authority for the condemnation

---

* The provision prevents the State from authorizing a railroad through the forest preserve (*People* v. *Adirondack Railway Co.*, 160 N. Y. 225; see also *Adirondack Railway Co.* v. *Indian River Co.*, 27 App. Div. 326) or building a bobsled run (*Assn. Protection Adirondacks* v. *MacDonald*, 253 N. Y. 234), and constitutional amendments were necessary to permit the State to construct highways and ski trails.

The State freely consents to the taking of its lands by the United States in time of war or national emergency, with the necessary exception: "except those the alienation of which is prohibited by the constitution of the state of New York" (State Law § 51, as amended by L. 1941, c. 670).

now involved, and that the courts below followed him in his error. His letter of authorization uses the phrases "necessary and advantageous" and "for military or other public purposes" (R. 136). The first phrase is from the General Condemnation Act of 1888, which also suggests the second in its phrase "for other public uses". It is plain upon the face of the 1888 Act, and upon the face of the Second War Powers Act of 1942, that the language of the latter Act, authorizing condemnation of real property "that may be deemed necessary, for military, naval, or other war purposes", gains nothing, so far as concerns scope of authority for condemnation under the 1942 Act, from the 1888 Act.

To weigh the defenses urged by the State it is necessary that the authority of the Secretary of War be defined exactly according to the applicable statutory language. It is apparent from the phrases that he used that he erred, an error repeated in the petition (R. 33-37, paragraphs 1, 2, 4, 8), and the courts below fell into the same error. Although Judge Bryant referred to the taking as for "war purposes" (R. 90, fol. 270), his views as to the breadth and finality of the discretion vested in the Secretary were probably influenced by the error mentioned. Judge Brennan supposed that the issue was whether the property was taken for "a private rather than a public use" (R. 159, fols. 476-477). The opinion of Judge Clark, in which Judge Swan concurred, makes the same assumption and concludes that the challenged taking was "a legitimate public use", a "public purpose", or a "public aim."

This loose generality in statement of the issue, following the error of the Secretary of War in stating his exact statutory powers, makes it impossible, either that the Secretary was guided by the true measure of his powers in making his

determination, or that the courts below judged truly between him and the State. The importance of this question of statutory interpretation, to other cases as well as the present one, is apparent.

B.

The opinions of the Circuit Court of Appeals suggest some doubt, since *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, as to whether it is still a judicial function to determine whether property is taken for a public use. The importance of this question needs no argument.

In the present case the judicial abnegation of the courts below was more extreme than would have been a refusal to review judicially a legislative or administrative determination that a certain purpose for taking property is a public purpose, or that the scope of the taking measured by property or duration was justifiable by that public purpose. They failed to test the scope of administrative discretion by its specific statutory authority. Confronted with an administrative declaration that was indefinite as to the public purposes invoked, and hence as to the necessity relative to any specific public purpose of taking for the second of two periods mentioned, it being apparent that the two periods probably were determined by different purposes, the courts below denied any judicial function to ascertain more definitely the actual relationship between the taking and a specific public purpose. Citing *United States* v. *Meyer*, 113 Fed. 2d 387, for the proposition that they could not "question" the Secretary's determination (R. 90-91, C.C.A.), they refused to permit the State to give definiteness from other sources to an indefinite declaration.

C.

The decision below involves two attempts by the State to challenge the taking for the fifteen year period, and it is the second of those which is the basis of Judge Learned Hand's dissenting opinion and of the third question stated herein. That is, even if the courts below saw no basis for the State's defenses to the taking in 1942, they should have been more receptive to those presented by the motion to reopen in 1946. Not only did that motion offer new evidence*, but it offered it in a new factual setting, open to judicial notice. Hostilities were at an end, so was the period for which the power of condemnation under the Second War Powers Act of 1942 was to be in force, the Defense Plant Corporation was to be divested of its active powers in early 1947, and its lease of the railroad to National Lead Company was to expire only thirty days after the beginning of the fifteen year period. Assuming that the powers of the Secretary of War were appropriately exercised in 1942, not only to take the railroad site for the war emergency period but also for a reasonable period thereafter for salvage and liquidation purposes, the courts below should have entertained the inquiry proposed by the motion in 1946, as to whether the fifteen year period was excessive and "arbitrary".

BRIEF SUPPORTING PETITION

It is submitted that the three questions presented herein are matters of constitutional right, whether the United States derives its power of condemnation, undiscovered until 1875, by implication from necessity or from the Fifth

---

* The new evidence was summarized in the majority opinion of the Circuit Court of Appeals as, "an offer, hardly shown to be clear cut, of the premises for disposal as surplus property after the close of hostilities."

Amendment (see *Kohl* v. *United States*, 91 U. S. 367, 371-372). It would be strange if a Government power is to be implied as a matter of constitutional law from the necessity for it, but that there can be no judicial inquiry whether it is necessary in particular instances, or whether the necessity covers the entire taking, in amount or duration. The opposite conclusion seems to be supported by such cases as *Brown* v. *United States*, 263 U. S. 78; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55; *Cincinnati* v. *Vester*, 281 U S. 439; and *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546. Opinions may vary as to the degree of deference due to a legislative or an administrative determination of public purpose or of necessity, but the question is never withdrawn completely from judicial cognizance.

In the present case there is no legislative determination that any public purpose of the United States requires specific property to be taken, or that if property is taken for the principal purpose some may be taken for incidental purposes. In this respect the present case is distinguishable from the *Brown*, *Old Dominion*, and *Welch* cases, mentioned above. The Act now involved, instead of conferring an authority upon the Secretary of War in the language, "as he may deem necessary", such as was involved in *United States* v. *Carmack*, 329 U. S. . . . ., and numerous other cases, uses the impersonal phrase, "that shall be deemed necessary". The implication from this unusual congressional language is that the determination of necessity is not vested finally in the Secretary.

The courts below held that the question was solely for the Secretary (R. 90-91, 160), or "that the scope of judicial review is decidedly limited in any event" (C.C.A.) to such an extent that "all these considerations are legiti-

mate ones for the Secretary, and not for the courts" (C. C.A.). For present purposes there does not appear to be any difference between the positions of the District Court and of the Circuit Court of Appeals majority. Each has failed to test the action of the Secretary of War against its exact statutory authority, to go behind an indefinite declaration of authority to learn its definite basis, or otherwise to find anything for judicial consideration in the defenses pleaded by the State.

Prior to 1875 it seems to have been accepted that the United States had no power of eminent domain except in the territories (*Pollard's Lessee* v. *Hagan*, 44 U. S. 212, 223) but it could use the eminent domain power of a State to acquire lands within its borders (7 Op. A. G. 114, 1855; 8 Op. A. G. 31, 1856; 8 Op. A. G. 333, 1857; 10 Op. A. G. 18, 1861; 12 Op. A. G. 173, 1867). An instance in New York in 1847 was *United States* v. *Dumplin Island*, 1 Barb. 24.

In 1879, following decision of the *Kohl* case and referring to it, the Attorney General of the United States ruled that condemnation under the newly discovered Federal power of eminent domain required express authority by Congress (16 Op. A. G. 369, at p. 371). He said the same in 1886 (18 Op. A. G. 327, 341-342).

The General Condemnation Act of August 1, 1888 (25 Stat. 357, 40 U. S. C. § 257) was thereupon enacted. It assumed the existence in the Secretary of the Treasury and other officers, from time to time, of an authority to procure real estate for public buildings or other public uses, and for such cases provided:

> "he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

The limited purpose of the bill was not only clear upon its face, but was shown in a House Report upon the bill from the Committee on Public Buildings and Grounds, and in a statement on its behalf by its sponsor upon passage in the House. The House Report was dated February 14, 1888 (H. R. 409, 50th Cong., 1st Sess., Ser. Vol. 2599) and said concerning the bill:

> "This bill is designed to give the option of condemnation of sites for public buildings, in case where the Government can not acquire on reasonable terms by contract. The words used in acts for public buildings have usually been the words 'purchase or otherwise provide'; and under these words it is the opinion of the Attorney General that condemnation proceedings are not authorized."

A week later, when the bill was about to be passed in the House, Congressman Dibble, introducer of the bill and chairman of the committee which reported it, said (Cong. Rec. p. 1387):

> "This bill as amended proposes simply to give to the Secretary of the Treasury*, by a general enactment, authority which has in some particular bills been omitted; and it also proposes to extend to the district courts the jurisdiction which the Supreme Court has already decided is possessed by the circuit courts under the judiciary act."

Sometimes references have been made to the General Condemnation Act of 1888 which may be understood as suggesting that it gives an independent power of condemnation, or adds something to authority elsewhere conferred. See *Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 585, 587, and *United States* v. *Carmack,* 329 U. S. ...., 91 L. ed. 165, 168. It seems clear that this is not generally so.

---

* The words "or any other officer of the Government" were added to the bill by a subsequent amendment, also language applicable to other cases than sites for public buildings.

But if it were generally so, a different intent appears as to the authority conferred by the Second War Powers Act of 1942 (56 Stat. 177, 50 U. S. C. § 171-a). That contains its own specific measure of authority to condemn, and refers to the 1888 Act with the phrase, "such proceedings to be in accordance with". The legislative intent as to the limited relationship between the two acts is clearly expressed. Although nothing very pertinent has been found in the committee reports upon the bill (77th Cong., 2d Sess., S. Rep. 989, Ser. Vol. 10656; H. R. 1765, Ser. Vol. 10661) or the conference reports or over a hundred pages of discussion in the Congressional Record, the general tendency of this material is that Congress was conscious it was conferring extraordinary powers upon the President and the executive departments, and intended them to expire automatically at a specific time and to be otherwise limited.

It seems clear, in the light of the language and legislative history of the two acts, that the Secretary of War erred in declaring his authority to condemn in phrases derived from the 1888 Act, that it was "necessary and advantageous to the interests of the United States", "for military or other public purposes" (R. 136), to take the railroad site for the two periods specified. His declaration should have been that it was "deemed necessary, for war purposes". The declaration made, being broader than the authority possessed, leads to a presumption that the taking was not measured by the appropriate authority.

This court has always insisted upon clear findings of jurisdictional facts. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431-433; *United States* v. *B. & O. R. Co.,* 293 U. S. 454, 462-465; *Morgan* v. *United States,* 298 U. S. 468, 480; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 576; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 592-593, 595-

596; *Yonkers* v. *United States,* 320 U. S. 685, 690-692. Applicable to the present case are its words in *Florida* v. *United States,* 282 U. S. 194, 211-212:

> "The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

The courts below should at least have recognized that the Secretary's declaration was inexact and indefinite in its relationship to the true measure of his authority, and for this reason, if no other, it was not prohibitive of judicial examination. They should at least have permitted the State to refer to materials other than the Secretary's declaration to make definite the inexactly declared purposes of condemnation.

That would open the door to the defenses offered by the State. Among them, the alternatives open to National Lead Company for transportation of its iron ore in times of peace (R. 78); the lease of the proposed railroad, four months before the condemnation, from Defense Plant Corporation to National Lead Company, expiring thirty days after expiration of the war emergency period (R. 46-47, 52-66); the fixed and already expired period for exercise of the condemnation power under the Second War Powers Act (R. 49, fol. 147), not as a hard and fast limitation upon the estate that could be taken but as a reason for examining more critically a taking beyond the limited period; the limited life period of Defense Plant Corporation (R. 50, fol. 149) for like reason; and the explanation of the fifteen year period of taking made contemporaneously with the

condemnation on behalf of Defense Plant Corporation to Senator Wagner:

> "We are proceeding on the basis of requesting an easement to extend only 15 years after the emergency. The reason for this term of easement is to prevent the Government from being forced to sacrifice its investment without an opportunity of working out a proper liquidation." (R. 135.)

Add to those facts, and the special interests of the people of the State of New York in the property condemned as exemplified in the State Constitution, the new facts offered in 1946 in the new factual setting of the post-hostilities period, the offer of this railroad as surplus (R. 152, fols. 455-456), even if reconsidered (R. 156-157), thus confirming the earlier indications as to the salvage purpose which determined the fifteen year period.

An anticipated answer to all the State's arguments (and a somewhat superficial one, it is submitted) is that the United States could have taken the fee for the railroad, thus avoiding any question as to whether the fifteen year period was appropriately related to salvage needs. For present purposes it should be sufficient to say: First, whatever was taken there should have been a definite declaration of purpose and necessity. Second, perhaps taking the fee and disposing of it as war surplus would be excessively thrifty, under all the circumstances, and unworthy of the Government. Third, probably it would be impractical. Probably no private bidder would give much beyond quick salvage value for a railroad right-of-way which would be exposed immediately to the eminent domain power of the State for return to its Forest Preserve.

The argument of this petition and brief accepts what was done in 1787 and 1789 to create a federalized government with powers defined by a written constitution. It

assumes general acceptance of the ideal expressed in the phrase, a government of laws and not of men. Without such acceptance, there is so little in common that constitutional argument is impossible. The doctrine of the supremacy of the United States in its constitutional powers means that they must be kept within some orderly limits, or they swallow up all and there is an end of constitutional law as it has been known in the United States.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted, and that the three questions hereinbefore stated should be argued and decided.

Albany, April 7, 1947.

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for Petitioner.

WENDELL P. BROWN,
Solicitor General,
HENRY S. MANLEY,
Assistant Attorney General,
of Counsel.